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No. 481

In the

Supreme Court of the United States

OCTOBER TERM, 1966

WAGGONER CARR,
Defendant-Appellant,

v.

CITY OF ALTUS, OKLAHOMA, et al.,
Plaintiffs-Appellees.

On Appeal from the United States District Court for the Western District of Texas, Austin Division.

APPELLEES' MOTION TO AFFIRM

A. W. WALKER, JR.,
4300 First National Bank Bldg.,
Dallas, Texas, 75202,
Attorney for Appellees.

Of Counsel:
BEN B. WEST,
JACK PEW, JR.,
JACKSON, WALKER, WINSTEAD,
CANTWELL & MILLER,
4300 First National Bank Bldg.,
Dallas, Texas.

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APPELLEES' MOTION TO AFFIRM

To the Supreme Court of the United States:

Appellees move to affirm on the ground that it is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument. The careful and detailed opinion below has correctly re-

solved each of those questions in accordance with principles that have long since been settled by decisions of this Court.

STATEMENT

The material facts are correctly stated in the opinion below. The "Statement of the Case" presented by Appellant (Jurisdictional Statement 6-8) is substantially accurate, but needs some supplementation and correction.

Appellant says, with respect to Appellee City of Altus's only existing water source, the W. C. Austin Project, that:

> "If the Federal Government would permit it, the Lugert-Altus reservoir water could be used for the higher use without taking water out of the State of Texas." (Jurisdictional Statement 7.)

Such statement is without support in the record. There is no evidence that the Federal Government has the power to permit the City to increase its annual allotment of water from the reservoir (which allotment is set by contract), and no evidence that, even if the Federal Government has such power, it would exercise it in favor of the City of Altus to the detriment of others. It is stipulated that:

> "Attempts by Plaintiff City of Altus to obtain from the Lugert-Altus Irrigation District an increase in its annual water allotment have been unsuccessful since all available water drawn from the Project over and above said allotment is at all times committed to other users." (Stipulation of Facts, para 3.)

Appellant notes that the Odell Sand Hills, about 6 square miles of which are under the ranch of Appellees Mr. and Mrs. C. F. Mock, constitute the only economically available ground water within a 50 mile radius of either Appellee City

of Altus, Oklahoma, or the City of Vernon, Wilbarger County, Texas, that is of such quantity and quality as to be adequate and suitable for municipal purposes. (Jurisdictional Statement 6.) We add that the center point of the Mock Ranch, in Wilbarger County, Texas, is midway between the said cities of Vernon and Altus, being about 17 miles from both cities, and that the northern boundary of the Mock Ranch is the southern bank of the Red River, which is the southern boundary of the State of Oklahoma. (Stipulation of Facts, paras. 2, 5.) Appellee City of Altus, in recent years, has enjoyed a rapid growth of population, from 9,735 in 1950 to an estimated 23,500 in 1965. (Stipulation of Facts, para. 2.) It is this growth that has created the critical water shortage now facing the City; the City's annual allotment of water from the W. C. Austin Project, 4800 acre feet, was set by contract in 1941. (Stipulation of Facts, para. 3.) In contrast, the City of Vernon, Wilbarger County, Texas, has decreased in population from 12,651 in 1950 to an estimated 12,500 in 1965. (Stipulation of Facts, para. 3.)

The following chronology will show the considerable amount of work already completed or under way by and on behalf of the City of Altus for the purchase and transport of the ground water from the C. F. Mock Ranch at the time *Article 7477b* was introduced in the Texas Legislature.* It will also be of assistance to the Court in evaluating the purpose of *Article 7477b*.

* Up to the time of trial, the City had incurred expenses in the approximate amount of $110,720.09. It has contracted for total expenses of at least $1,311,582.69. (Stipulation of Facts, para. 6.)

1. *Year 1963.* City of Altus for the first time uses its entire annual water allotment of 4800 acre feet.

2. *March 1964.* Holway Engineers, Inc., by its *Report of Water Supply*, makes a study of possible water supply sources for the City of Altus and recommends that water be obtained from the C. F. Mock Ranch.

3. *September 1964.* Layne-Western Company drills water well test holes on the C. F. Mock Ranch and submits the results to the City of Altus in its *Ground Water Survey for City of Altus.*

4. *November 1, 1964.* City of Altus uses all of its 1964 water allotment and is forced to "borrow" 700 acre feet from its 1965 water allotment.

5. *November 4, 1964.* City of Altus and C. F. Mock enter into "Contract and Option" granting the City of Altus an option to purchase ground water from the C. F. Mock Ranch.

6. *December 8, 1964.* Citizens of City of Altus vote to issue $2,000,000.00 in municipal bonds to finance the purchase and transportation of ground water from the C. F. Mock Ranch.

7. *January 26, 1965.* House Bill No. 225 (now *Article 7477b*) is introduced before the Texas Legislature by W. S. Heatly, representative from the Texas legislative district which includes Wilbarger County, location of the C. F. Mock Ranch and the City of Vernon.*

* The bill was passed by the Texas Senate on May 26, 1965, and by the Texas House on May 28, 1965. It was signed by the Governor on June 17, 1965.

8. *May 1, 1965.* Bonds of City of Altus for the purchase and transportation of ground water from the C. F. Mock Ranch are issued.

9. *May 29, 1965.* City of Altus and C. F. Mock enter into agreement for the purchase of ground water from the C. F. Mock Ranch.

10. *May 31, 1965.* 59th Legislature of the State of Texas adjourns. (The next regular session of the Legislature will commence on January 10, 1967.)

11. *August 30, 1965. Article 7477b* becomes effective.

ARGUMENT

Appellant's contentions are (1) that the three-judge court should have abstained from exercising jurisdiction, (2) that Appellees' suit violates the Eleventh Amendment, (3) that such suit was premature, and (4) that *Article 7477b, Texas Revised Civil Statutes,* which prohibits the withdrawal of water from any underground source in Texas "for use in any other state by drilling a well in Texas and transporting the water outside the boundaries of the State," does not constitute an unreasonable burden upon interstate commerce. These same arguments were urged upon the court below. The opinion of that court attests to the thorough consideration that such arguments have received; it shows on its face that logic, justice, and established law required that such arguments be rejected. Such an opinion needs no defense. We only point out that Appellant has shown nothing in his Jurisdictional Statement which casts the slightest doubt upon it.

I. The court below correctly declined to abstain from adjudicating the constitutional question.

Appellant's first contention is that, inasmuch as *Article 7477b, Texas Revised Civil Statutes*, has not been construed by the Texas courts, the court below should have abstained from determining its constitutionality. In overruling Appellant's argument, the court below followed the rule, long since settled by this Court, that deference to state court adjudication need "only be made where the issue of state law is uncertain," *Harman v. Forssenius*, 380 U.S. 528, 534 (1965), that "if a state statute is not fairly subject to an interpretation which will avoid or modify the federal constitutional question, it is the duty of a federal court to decide the federal question when presented to it." *United States v. Livingston*, 179 F. Supp. 9, 13 (E.D.S.C., 1959), affirmed on motion, 364 U.S. 281 (1960).

Section 2, the operative portion of *Article 7477b*, reads as follows:

> "Sec. 2. No one shall withdraw water from any underground source in this State for use in any other state by drilling a well in Texas and transporting the water outside the boundaries of the State unless the same be specifically authorized by an Act of the Texas Legislature and thereafter as approved by it."

Simply to read this section is to observe that, as in *City of Chicago v. Atchison, T. & S. F. Ry. Co.*, 357 U.S. 77, 84 (1958), there is "no ambiguity in the section which calls for interpretation by the state courts." Indeed, as in *Harman v. Forssenius*, 380 U.S. 528, 536 (1965), Appellant does not designate anything in the statute that leaves "reasonable

room" for a state court construction "which might avoid in whole or in part the necessity for federal constitutional adjudication." The statute plainly and simply prohibits interstate commerce in ground water.

Citing *Williams v. City of Wichita, Kansas*, 279 F. 2d 375 (10 Cir., 1960), Appellant insists that the court below should not have determined "rights to underground waters in advance of authoritative action by State courts." (Jurisdictional Statement 9.) In the first place, the *Williams* case is hardly in point: it was a suit to adjudicate the validity of water permits issued under a Kansas statute; the plaintiff did not even contend that such statute was unconstitutional. 279 F. 2d 377. The essential difficulty with Appellant's argument, however, is that, whatever may be the situation in other states, the Texas law of "rights to underground waters" has long since been authoritatively determined. As the court below held, citing two decisions of the Texas Supreme Court, "the law of Texas is well settled that the landowner has the right to drill wells and appropriate the water beneath his land. City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 276 S.W. 2d 798 (1955); Houston & T. C. Ry. Co. v. East, 98 Tex. 146, 81 S.W. 279 (1904)." (Opinion 6.) See also *Texas Co. v. Burkett*, 117 Tex. 16, 29, 296 S.W. 273, 278 (1927) (Percolating waters "are the exclusive property of the owner of the surface of the soil"); *Pecos County Water Control & Imp. Dist. v. Williams*, 271 S.W. 2d 503, 505 (Tex. Civ. App., 1954), writ refused, n.r.e. ("It seems clear to us that percolating or diffused and percolating waters belong to the landowner, and may be used by him at his will"); *United*

States v. Shurbet, 347 F. 2d 103, 106 (5 Cir. 1965) ("In Texas the common law rule prevails that the owner of the land owns the soil and the percolating water which is part of the soil"). Appellant cites nothing to the contrary, and although he now tells this Court that title to underground water in Texas "is not in the landowners, or, at the very least, such 'ownership' is uncertain" (Jurisdictional Statement 9), he himself recognized, as recently as 1963, that in Texas:

> "It is clear under the authorities that the owner of land is the absolute owner of the soil and of the percolating ground water thereunder * * *." Attorney General's Opinion No. C-199, dated December 20, 1963.

The Texas law is no less "clear" now than it was in 1963. Nor has the Texas Legislature ever undertaken to change it. On the contrary, the express terms of *Article 7477b, Section 7*, confirm the "ownership and rights of the owner of the land * * * in underground water."

There is no ambiguity in *Article 7477b*, and no unsettled question of law, that could justify abstention in this case. No other ground for abstention is now seriously urged.

In the court below, Appellant did contend that, before taking jurisdiction, the court should have required Appellees to exhaust a supposed "remedy" of petitioning the Texas Legislature for a special statute that would exempt them from the provisions of *Article 7477b*.* This point is formally alleged at page 5 of the Jurisdictional Statement, but, since it is not briefed by Appellant, we need not discuss it at

* It will be recalled that the statute prohibits withdrawal of underground water for use in another state and transporting across state lines "unless the same be specifically authorized by an Act of the Texas Legislature and thereafter as approved by it."

length. Suffice it to say that inasmuch as the Texas Legislature does not meet again until 1967, and inasmuch as it is obvious that *Article 7477b* was specifically directed against Appellees, the court below puts it mildly when it expresses "doubt" that Appellees "had any realistic remedy available through the Texas Legislature." (Opinion 7-8.) In any event, the complete answer to this part of Appellant's case is given at pages 7-8 of the opinion below, and such answer is not now challenged by Appellant.

It was the clear duty of the court below to proceed, as it did, to adjudicate the constitutional issue.

II. The court below correctedly held that Appellees' suit does not violate the Eleventh Amendment.

At least since *Smyth v. Ames*, 169 U.S. 466, 518-519 (1898), it has been "the settled doctrine of this court that a suit against individuals for the purpose of preventing them as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of" the Eleventh Amendment. By *28 U.S.C.A. §2281* the Congress has specifically given three-judge courts the authority to issue an "interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute * * *."

Appellant asked the court below, however, and now he asks this Court, to amend *§2281*, and engraft a limitation on *Smyth v. Ames*, by holding that a suit to restrain a

State officer from enforcing an unconstitutional statute will violate the Eleventh Amendment, unless such officer is "*specifically* authorized by statute to enforce the particular statute under attack." (Jurisdictional Statement 17, emphasis added.) Appellant's contention is without logical substance, and was rejected by this Court in *Ex Parte Young*, 209 U.S. 123 (1908). The *Young* case, which the court below followed and which Appellant does not attempt to overcome, holds:

> "In making an officer of the State a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the State, and thereby attempting to make the State a party.
>
> "It has not, however, been held that it was necessary that such duty should be declared in the same act which is to be enforced. In some cases, it is true, the duty of enforcement has been so imposed (154 U.S. 362, 366, § 19 of the act), but that may possibly make the duty more clear; if it otherwise exist it is equally efficacious. The fact that the state officer by virtue of his office has some connection with the enforcement of the act is the important and material fact, and whether it arises out of the general law, or is specially created by the act itself, is not material so long as it exists." (209 U.S. 157.)

Ex Parte Young was re-affirmed in *Georgia Railroad & Banking Co. v. Redwine*, 342 U.S. 299 (1952). See also *Louisiana State Board of Education v. Baker*, 339 F. 2d 911 (5 Cir., 1964).

Appellant relies heavily upon *Fitts v. McGhee*, 172 U.S. 516 (1899). In *Ex Parte Young*, however, the *McGhee* case was limited to its facts—i.e., to situations in which the state officials being sued "occupied the position of having no duty at all with regard to the act." *209 U.S. 158.* Appellant, Attorney General of the State of Texas, could not and does not occupy that position with regard to a Texas statute which undertakes to prohibit the removal of water from the state. The Texas Supreme Court has held, in a case cited by the court below and in no way challenged by Appellant, that the Attorney General "is the chief law officer of the State, and it is incumbent upon him to institute in the proper courts proceedings to enforce or protect any right of the public that is violated." *Agey v. American Liberty Pipeline Co.*, 141 Tex. 379, 382, 172 S.W. 2d 972, 974 (1943). Moreover, as pointed out by the court below, the Texas Legislature, in *Article 7477(11), Texas Revised Civil Statutes*, has specifically given the Attorney General the right "to enforce any provisions of" that chapter of the Texas statutes which deals with the use of state water.* And, if

* At page 19 of the Jurisdictional Statement, Appellant contends that *Article 7477(11), Texas Revised Civil Statutes* (which authorizes the Attorney General to enforce the provisions of "this Chapter"), only "relates to Texas water permit 'appeals,' and does not remotely relate to this suit," and further contends that, in suggesting that *Article 7477(11)* would give the Attorney General the right to enforce *Article 7477b*, the court below has relied solely upon the whim of a "law book codifier." A glance at the Texas statutes will show, however, that the court below was right and Appellant is wrong. In 1925, the Texas Legislature (not a law book company) codified all statutes relating to the use of state water into *Chapter 1, Title 128, Texas Revised Civil Statutes*, and gave such chapter the title of "Use of State Water." In 1953, the Texas Legislature passed a statute which declared that "Article 7477 of Chapter 1 of Title 128 of the Revised Civil Statutes of Texas, 1925, be and the same is hereby amended so as to hereafter (footnote continued)

is interesting to note, Appellant certainly does not disclaim the power to enforce *Article 7477b*; on the contrary, he agrees that "he is 'in a general sense' charged with the enforcement of all laws and could possibly enforce the terms of this statute." (Jurisdictional Statement 16.)* It is abundantly clear that Appellant has at least "some connection with the enforcement of" *Article 7477b*, and that, therefore, Appellees' suit to restrain such enforcement is not in violation of the Eleventh Amendment. *Ex Parte Young*, 209 U.S. 123 (1908), *supra*.

Appellant also insists that Appellees' suit is barred by the Eleventh Amendment because, he says, the procedure afforded by *28 U.S.C.A. §2281* must be restricted to cases in which the state official being sued has "actively tried to enforce" the statute "against the complainant." (Jurisdictional Statement 18.) This is simply a claim that Appellees' suit is premature; and, therefore, following the order of both

(footnote continued from page 11)
read as follows: * * *." *Acts 53rd Texas Legislature, Regular Session, p. 874.* The provision which is now *Article 7477(11)* was part of this 1953 amendment to such Chapter 1. Thus, the authority to enforce the provisions of "this Chapter," given the Attorney General by *Article 7477(11)*, is the authority to enforce the provisions of *Chapter 1, Title 128, Texas Revised Civil Statutes*, dealing with the use of state water. *Article 7477b* deals with the use of water located within the state. It thus follows that, under the authority vested in him by *Article 7477(11)*, Appellant would have the power to enforce *Article 7477b*.

* Appellant says that his power to enforce *Article 7477b* "would not be exclusive in that local prosecutors could no doubt seek to enforce it also." (Jurisdictional Statement 16.) While we are uncertain as to what this has to do with the Eleventh Amendment, we point out that, at least in federal court, Appellant's power to enforce *Article 7477b* would indeed be exclusive. Local prosecutors can represent the State of Texas only in the district and inferior courts of such prosecutors' respective counties. *Texas Constitution, Article V, §21.*

the court below and the Jurisdictional Statement, we will discuss such claim in the section which immediately follows.

III. The court below correctly held that Appellees' suit is not premature.

Appellant's contention that this suit presents no "bona fide 'actual controversy' sufficient to give this Court jurisdiction" (Jurisdictional Statement 20), is answered by the stipulated facts of this case. Appellee City of Altus is in obvious need of water. (Stipulation of Facts, para. 3.) As early as March 1964, an engineering firm recommended that the City acquire from Appellees the Mocks the subsurface water rights in and to land owned by the Mocks in Wilbarger County, Texas. (Stipulation of Facts, para. 4.) On December 8, 1964, the City voted a $2,000,000.00 bond issue to pay for the cost of financing the leasing, drilling, and transportation of water from the Mock land, and the bonds were issued on May 1, 1965. (Stipulation of Facts, para. 5.) On May 29, 1965, by written agreement, Appellees the Mocks leased their land to the City for the sole and only purpose of mining and operating for subsurface water and for the transportation of such water to the City of Altus for its use. By the time of trial, Appellee City had incurred expenses totalling approximately $110,720.09 in connection with its project. All of this will be in vain, however, if the City cannot transport water produced from the Mock lands into Oklahoma. *Article 7477b*, introduced in the Texas Legislature by the representative from the district which includes the Mock land, and enacted in 1965, specifically forbids the transportation of such water across

state lines. Appellees cannot go forward with the performance of their lease until they can establish the invalidity of *Article 7477b*. The statute is self-executing.

It was observed by the court below, and not denied by Appellant, that the intent of the Declaratory Judgment Act, *28 U.S.C.A. §2201*, was "to avoid accrual of avoidable damages to one not certain of his rights and to afford him an early adjudication without waiting until his adversary should see fit to begin suit, after damage had accrued." *Edelmann & Co. v. Triple-A Specialty Co.*, 88 F. 2d 852 (7 Cir. 1937), cert. den., 300 U.S. 680 (1937), quoted below at opinion footnote 14. The jurisdictional requirement is only that there "be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Inc. Co. v. Hayworth*, 300 U.S. 227, 241 (1937). "Thus the fundamental test is whether the plaintiff seeks merely advice or whether a real question of conflicting legal interests is presented for judicial determination." *Simmonds Aerocessories v. Elastic Stop Nut Corp.*, 257 F. 2d 485, 489 (3 Cir., 1958). Accord: *Application of President & Directors of Georgetown College*, 331 F. 2d 1000 (D.C. Cir., 1964), cert. den., 377 U.S. 978 (1965). Certainly, this test has been met here. Appellees' suit was not brought to try out some abstract, hypothetical question. It was brought to preserve and protect existing rights from loss or destruction, and to insure that the City may legally acquire the water it so badly needs. This is precisely the

kind of suit for which the Declaratory Judgment Act was designed.

Appellant says, however, that the suit "is premature at the present time because the Attorney General of Texas has not enforced Art. 7477b, nor has he in any way manifested an intent to enforce this statute." (Jurisdictional Statement 20.) The court below has properly rejected this argument as both legally unsound and factually unrealistic.

Appellant relies heavily upon *Southern Pacific v. Conway*, 115 F. 2d 746 (9 Cir., 1940). In that case, however, the defendant-Attorney General expressly declared "that he had formed no opinion or belief and makes no contention either as to the validity, constitutionality or unconstitutionality" of the challenged statute, *115 F. 2d 748*, and that he "would not attempt to enforce the law until he formed an opinion that it was constitutional." *115 F. 2d 749*. Here, in contrast, Appellant has specifically pleaded that *Article 7477b* "is a valid exercise of the residual power vested in the various United States under the 10th Amendment of the United States Constitution, in that it seeks to insure and provide an adequate water supply for the citizens of Texas," and he has prayed "that Plaintiffs be denied all relief sought because Art. 7477b is a valid and constitutional statute, duly enacted by the Legislature of the State of Texas, for the protection and welfare of its citizens." (Defendant's Original Answer.)* Moreover, the *Southern Pacific* case has never

* Contrary to page 25 of the Jurisdictional Statement, there has never been, in our case, any "admission of Plaintiffs-Appellees below" that "the Attorney General of Texas has not enforced or threatened to enforce Article 7477b."

been approved by this Court, and Professor Moore, in *6 Moore's Federal Practice §57.18 (1965)*, has criticised it as follows:

> "The very presence of the statute was a direct and immediate threat to [the plaintiff-railroad's] interests. The fact that the Attorney General refused to commit himself on the issue of validity was of no comfort to the railroad. If it violated the terms of the statute, it subjected itself to a suit for the recovery of the harsh statutory penalties. If it obeyed the statute, it suffered an economic loss. Such a choice should not have been forced upon it. Even had the Attorney General publicly declared that in his opinion the statute was unconstitutional, this would afford scant protection for he would not be bound to follow such a determination, and certainly his successor could disregard it." (6 Moore, p. 3101.)

The only other decisions relied upon by Appellant are two district court cases, neither of them even arguably in point. In *Darby v. Daniel*, 168 F. Supp. 170 (D.C. Miss., 1958), the plaintiffs claimed that they were being harassed by the Attorney General's threats to enforce the Mississippi champerty and maintenance statutes against them. The district court held that there was no evidence of any such threats. In *Humble Oil & Refining Co. v. State Mineral Board*, 32 F. Supp. 45 (D.C. La., 1940), after the Louisiana Attorney General had rendered a legal opinion which, if correct, might have adversely affected the plaintiff's mineral leases, the plaintiff sought an advisory opinion from the federal district court as to whether the Attorney General was correct. The district court refused to give it. In neither of these cases did the court require litigants, as Appellant would

have this Court require Appellees, either to abandon a large investment and deprive a growing city of adequate water or to violate a statute which had been expressly directed against them. Neither of these cases could or did say or suggest that the declaratory judgment procedure is unavailable to a litigant who has been placed in such a dilemma.

No other cases are cited by Appellant. It is accurate to say, therefore, that, in an effort to support a position that is technical in the extreme, he relies exclusively upon decisions which have never been approved by this Court. In contrast, the court below has precisely followed the decisions of this Court and has thereby reached the only result that can be justified on the basis of fairness and realism.

In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), followed by the court below and never mentioned in the Jurisdictional Statement, suits were brought to restrain the Governor and other Oregon officials from threatening to enforce a compulsory education statute adopted in 1922 but not effective until 1926. The injunctions were granted, and this Court affirmed in 1925, even before the statute had become effective. The Court said:

> "The suits were not premature. The injury to appellees was present and very real, not a mere possibility in the remote future. If no relief had been possible prior to the effective date of the Act, the injury would have become irreparable. Prevention of impending injury by unlawful action is a well recognized function of courts of equity." (268 U.S. 536.)

In *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), also cited by the court below and left unchallenged by Ap-

pellant, this Court was concerned with the constitutionality of a West Virginia statute which placed restrictions upon the sale of natural gas outside of the state's borders. The case was filed only a few days after the statute had become effective, and no effort had been made by West Virginia to enforce it. Nevertheless, the Court found that the suits were not premature. It said:

> "The second question is whether the suits were brought prematurely. They were brought a few days after the West Virginia act went into force. No order under it had been made by the Public Service Commission; nor had it been tested in actual practice. But this does not prove that the suits were premature. Of course they were not so, if it otherwise appeared that the act certainly would operate as the complainant States apprehended it would. One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough." (262 U.S. 592-593.)

See also *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Terrace v. Thompson*, 263 U.S. 197 (1923); *Sunshine Mining Co. v. Carver*, 41 F. Supp. 60 (D.C. Idaho, 1941); *Brown v. Anderson*, 202 F. Supp. 96 (D.C. Alaska, 1962).

In *6 Moore's Federal Practice §57.18 (1965)*, the author urges that the following is the correct rule of law:

> "Accordingly it is believed that the declaratory action does not rest upon the vicissitudes of the prosecuting officer's personal opinion as to the validity of the public act. Where the enforcement of a regulatory statute would cause plaintiff to sustain a direct injury, the action may properly be maintained, whether or not the public officer has 'threatened' suit: the presence of the statute is threat enough." (*6 Moore, p. 3101.*)

It can hardly be questioned, we submit, that the court was correct in applying that principle to this case. No reasonable person or city is going to spend more than $1,000,000.00 to consummate a transaction which is in express violation of a statute that has never been determined to be invalid. Yet, if the City of Altus cannot make such an expenditure in this case, a large investment already made, and needed water rights duly contracted for, will be lost. Surely Appellees do not "have to await the consummation of threatened injury to obtain preventive relief" against a statute so harmful to them. *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923).

IV. The court below correctly held that Article 7477b is an unconstitutional burden on interstate commerce.

Article 7477b, Texas Revised Civil Statutes, provides that no one may "withdraw water from any underground source in this State for use in any other state by drilling a well in Texas and transporting the water outside the boundaries of the State * * *." It is difficult to imagine a more direct burden upon interstate commerce. *U.S. Constiution*, Article I, §8, cl. 3. The statute does not merely regulate interstate commerce in ground water, it prohibits it. It is in direct contravention of the policy so carefully described by this Court in *Hood & Sons v. Du Mond*, 336 U.S. 525 (1949):

> "The material success that has come to inhabitants of the states which make up this federal free trade unit has been the most impressive in the history of commerce, but the established interdependence of the states only emphasizes the necessity of protecting interstate movement of goods against local burdens and repressions.

We need only consider the consequences if each of the few states that produce copper, lead, high-grade iron ore, timber, cotton, oil or gas should decree that industries located in that state shall have priority. What fantastic rivalries and dislocations and reprisals would ensue if such practices were begun! Or suppose that the field of discrimination and retaliation be industry. May Michigan provide that automobiles cannot be taken out of that State until local dealers' demands are fully met? Would she not have every argument in the favor of such a statute that can be offered in support of New York's limiting sales of milk for out-of-state shipment to protect the economic interests of her competing dealers and local consumers? Could Ohio then pounce upon the rubber-tire industry, on which she has a substantial grip, to retaliate for Michigan's auto monopoly?

"Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality." (336 U.S. 538-539.)

In *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), this Court had before it a West Virginia statute which attempted to regulate the interstate transportation of natural gas, produced within West Virginia's borders, by requiring that local demands first be satisfied before any of such gas could be transported outside of the state. This Court held the statute unconstitutional. It said:

"Of course, in the last analysis, the question is whether the enforced withdrawal for the benefit of local consum-

ers is such an interference with interstate commerce as is forbidden to a State by the Constitution. The question is an important one; for what one State may do others may, and there are ten States from which natural gas is exported for consumption in other States. Besides, what may be done with one natural product may be done with others, and there are several States in which the earth yields products of great value which are carried into other States and there used. But, notwithstanding the importance of the question, its solution is not difficult. The controlling principles have been settled by many adjudications,—some so closely in point that the discussion here may be relatively brief.

"By the Constitution, Art. I, §8, cl. 3, the power to regulate interstate commerce is expressly committed to Congress and therefore impliedly forbidden to the States. The purpose in this is to protect commercial intercourse from invidious restraints, to prevent interference through conflicting or hostile state laws and to insure uniformity in regulation. It means that in the matter of interstate commerce we are a single nation—one and the same people. * * *

"Natural gas is a lawful article of commerce and its transmission from one State to another for sale and consumption in the latter is interstate commerce. A state law, whether of the State where the gas is produced or that where it is to be sold, which by its necessary operation prevents, obstructs or burdens such transmission is a regulation of interstate commerce,—a prohibited interference. [Citations.] The West Virginia act is such a law. Its provisions and the conditions which must surround its operation are such that it necessarily and directly will compel the diversion to local consumers of a large and increasing part of the gas heretofore and now going to consumers in the complainant States, and therefore will work a serious interference with that commerce." *262 U.S. 595-597.*

The *West Virginia* decision followed an earlier case, *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911), which held unconstitutional an Oklahoma statute that prohibited the construction of pipelines over or under state highways for the purpose of transporting natural gas beyond the state. The effect of the statute, of course, was greatly to restrict the owners of such natural gas from transporting it out of the state. This Court held:

> "Gas, when reduced to possession, is a commodity; it belongs to the owner of the land, and, when reduced to possession, is his individual property subject to sale by him, and may be a subject of intrastate commerce and interstate commerce. The statute of Oklahoma recognizes it to be a subject of intrastate commerce, but seeks to prohibit it from being the subject of interstate commerce * * *." 221 U.S. 255.
>
> "We place our decision on the character and purpose of the Oklahoma statute. The State, as we have seen, grants the use of the highways to domestic corporations engaged in intrastate transportation of natural gas, giving such corporations even the right to the longitudinal use of the highways. It denies to appellees the lesser right to pass under them or over them, notwithstanding it is conceded in the pleadings that the greater use given to domestic corporations is no obstruction to them. This discrimination is beyond the power of the State to make. As said by the Circuit Court of Appeals in the Eighth Circuit, no State can by action or inaction prevent, unreasonably burden, discriminate against or directly regulate interstate commerce or the right to carry it on. And in all of these inhibited particulars the statute of Oklahoma offends." 221 U.S. 262.

There is no reasonable distinction between natural gas and ground water, and Appellant suggests none. And *Article*

7477b is a far more substantial interference with interstate commerce than the statutes struck down in *West Virginia* and in *Kansas Natural Gas*. The West Virginia statute did not prohibit the export of natural gas not needed by West Virginia citizens. The Oklahoma statute did not prohibit interstate pipelines which could be constructed somewhere other than beneath state highways. But *Section 2, Article 7477b*, is an unequivocal, direct, and unlimited prohibition against *any* interstate transportation of Texas ground water. The court below had no choice but to declare *Article 7477b* unconstitutional.

In his effort to uphold the statute, Appellant advances the very same arguments that he urged upon the lower court. He contends (1) that, under Texas law, the water to be withdrawn from the wells on the Mocks' land is public property, and, hence, not an article of commerce, and, (2) that even if he is wrong, and the water is "commerce," the State of Texas may nevertheless prohibit the transportation of such commerce beyond its borders.

In this Court, Appellant's greater emphasis is on his first argument—that the Texas law is that water captured by wells on the Mocks' land belongs, not to the Mocks, but to the State. (Jurisdictional Statement 26-29.) The issue raised thereby is, however, purely a question of state law. The court below, composed of three Texas judges, has decided that the Texas law is against Appellant. The Supreme Court will not overrule them unless Appellant can show that their conclusion "is clearly erroneous or unreasonable." *United States v. Durham Lumber Company*, 363 U.S. 522, 527 (1960).

See also *Propper v. Clark*, 337 U.S. 472 (1949); *Spiegel v. Commissioner*, 335 U.S. 701 (1949).

Appellant's attempt to sustain this burden is based primarily upon an argument that *Article XVI, §59, Texas Constitution*, which declares that the "conservation and development of all of the natural resources of this State * * * are each and all hereby declared public rights and duties," vests absolute title to underground water resources in the State of Texas. (See Jurisdictional Statement 26-27.) That contention has been foreclosed against Appellant at least since *Texas Co. v. Burkett*, 117 Tex. 16, 296 S.W. 273 (1927). Of that case, the Supreme Court of Texas said, in 1955:

> "[B]y its holding in Texas Co. v. Burkett, 117 Tex. 16, 296 S.W. 273, 278, 54 A.L.R. 1397, decided some ten years after the adoption of the Conservation Amendment to the Constitution, Article XVI, § 59, Vernon's Ann. St., and the enactment of Articles 7602, V.A.C.S. and 846, Penal Code, this Court established that under the common-law rule there was no restriction against the sale of percolating waters for industrial uses off of the land. The Court said the waters 'were the exclusive property of Burkett [the owner of the land on which the water was captured], who had all the rights incident to them that one might have as to any other species of property." *City of Corpus Christi v. City of Pleasanton*, 154 Tex. 289, 294, 276 S.W. 2d 801-802 (1955).

Moreover, as we have seen, later Texas decisions have reaffirmed this principle, *Pecos County Water Control & Imp. Dist. v. Williams*, 271 S.W. 2d 503 (Tex. Civ. App., 1954), writ refused, n.r.e.; *United States v. Shurbet*, 347 F. 2d 103 (5 Cir., 1965); and, in 1963, some forty-six years after the

adoption of the Conservation Amendment, Appellant himself recognized that it "is clear under the authorities that the owner of land is the absolute owner of the soil and of the percolating ground water thereunder." *Attorney General's Opinion No. C-199 (1963).*

The consequence of this "clear" and settled rule of law is that, whatever may be the law in some western states (a point not even remotely at issue here), it is simply not true in Texas that, as alleged by Appellant, there "is no 'vested right' to capture and use underground percolating waters." (Jurisdictional Statement 29.) In *City of Corpus Christi v. City of Pleasanton*, 154 Tex. 289, 276 S.W. 2d 798 (1955), the common law of Texas was summarized as follows:

> "It thus appears that under the common-law rule adopted in this state an owner of land could use all of the percolating water he could capture from wells on his land for whatever beneficial purposes he needed it, on or off of the land, and could likewise sell it to others for use off of the land and outside of the basin where produced, just as he could sell any other species of property." (154 Tex. 295, 276 S.W. 2d 802.)

This same common law is the Texas rule today. There is not the slightest basis for Appellant's assertion that the legislature "did change" it. (Jurisdictional Statement 29.) In fact, *Article 7477b, Section 7*, specifically recognizes and confirms the "ownership and rights of the owner of the land * * * in underground water."

As an incident of the ownership of such water as their wells can capture, the Mocks may "sell it to others for use off of the land and outside of the basin where produced, just as [they] could sell any other species of property." *City of*

Corpus Christi v. City of Pleasanton, 154 Tex. 289, 295, 276 S.W. 2d 798, 802 (1955). *Article 7477b* so recognizes: it does not attempt to forbid the Mocks to sell their water intrastate. Clearly, then, the Mocks' water is, under Texas law, an article of commerce, just as the court below held it was. Far from being "clearly erroneous or unreasonable," such holding is in precise accord with unanimous Texas authority.*

There remains Appellant's final argument—that *Article 7477b* does not violate the Commerce Clause, that despite the clear holding of this Court in *West v. Kansas Natural Gas Co.*, 221 U.S., 229, 255 (1911), quoted above at page 22, the State of Texas may recognize ground water to be the subject of intrastate commerce but prohibit it from being the subject of interstate commerce.

The sole basis of Appellant's argument is that *Article 7477b*, he says, "is reasonable as a police measure." (Jurisdictional Statement 33.)

Exactly what facet of the police power Appellant has in mind is by no means clear. In the district court, Appellant urged that the statute was valid as a conservation measure, but the three-judge court rejected that contention, and Appellant does not pursue it here** and could not reasonably have done so. So far as *Article 7477b* is concerned, the Mocks

* We need only briefly notice Appellant's contention that, by *Article 7477b*, Texas has "merely regulated the drilling of water wells." (Jurisdictional Statement 33-34.) The statute does no such thing. It permits the landowner to drill wells wastefully or carefully, safely or dangerously. It regulates, not the drilling of the wells, but the interstate transportation of the water captured by such drilling. As observed by the court below, it is apparent, despite the phraseology of the statute, that its purpose, intent, and end result is to prohibit the interstate transportation of an article of com-

** Appellant seems to concede that there is no issue of conservation or waste involved. See Paragraph (i), Jurisdictional Statement 34.

can sell their water for transportation intrastate to Brownsville, Texas (a distance of more than 600 miles), by as wasteful a method as possible; what the statute provides is that, even if the water will be transported without any waste at all, the Mocks cannot sell it for transport to Oklahoma, which is at the northern boundary of their ranch. Quite obviously, *Article 7477b* bears no relationship to conservation of natural resources.

The cases so heavily relied upon by Appellant, *Geer v. Connecticut*, 161 U.S. 519 (1896), and *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908), are not in point. Neither of them involved a privately owned natural resource. Both dealt with statutes that applied to property in which the state had a proprietary interest.

In *Geer*, this Court was concerned with a Connecticut statute which prohibited the killing or transportation of woodcock, ruffled grouse, or quail for the purpose of conveying the same beyond the limits of the state. The Court upheld the statute upon the premise that "wild game within a State belongs to the people in their collective sovereign capacity. It is not the subject of private ownership * * *." 161 U.S. 529. In contrast, the water that Texas landowners may withdraw from wells on their land is not the subject of collective ownership but, as held by the three Texas judges below, is the private property of the landowner.

The *McCarter* case is of similar import. Under a New Jersey statute which prohibited the transportation of water from "any fresh lake, pond, brook, creek, river or stream of this State into any other state," the defendant was enjoined from carrying water from the Passaic River

into New York. The defendant contended the statute was unconstitutional, but this Court affirmed. Justice Holmes, speaking for the Court, said:

> "[I]t appears to us that few public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use." 209 U.S. 356.

The Court further observed, citing *Greer v. Connecticut*, 161 U.S. 519 (1896), supra, that one "cannot acquire a right to property by his desire to use it in commerce among the States," 209 U.S. 357.

Thus, it is clear that the New Jersey statute did not affect, and this Court did not hold that it did affect, the transportation of private property in interstate commerce. And, therefore, it is equally clear that the remarks of Justice Holmes, quoted at page 32 of the Jurisdictional Statement, are taken out of context and do not provide any support for *Article 7477b*. The *McCarter* case was concerned with the power of a state to prohibit a riparian appropriator from transporting, outside of the state, water taken from a river wholly within the state. The usufructary rights of a riparian appropriator in and to a public body of water and the absolute right of a land owner in and to his ground water are clearly distinguishable.

In any event, if any of the dictum in *McCarter* is susceptible to the interpretation that a state can prevent the export of privately owned natural resources, such interpretation has been expressly repudiated by this Court.

In *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911), the case which struck down the Oklahoma statute, the *McCarter* opinion was urged upon the Court, but the Court noted that the *McCarter* decision was founded upon two propositions: (1) that fresh water lakes, ponds, brooks, and rivers, and the waters flowing therein, constitute an important part of the natural advantages of the state, and (2) that the common law recognized in the riparian owner no right to divert water from the stream in order to make merchandise out of it. The Court then held, Mr. Justice Holmes dissenting, that neither of those propositions would support a statute which, like *Article 7477b*, involved individual property subject to sale by its owner.

At the same time, a lower federal court was concerned with the same Oklahoma statute that was before the Supreme Court in *West v. Kansas Natural Gas Co., supra.* The state there relied upon the *McCarter* opinion, but the circuit court, like the Supreme Court, held it to be inapplicable. It said, in *Haskell v. Cowham*, 187 F. 403 (8 Cir., 1911):

> "Hudson Water Co. v. McCarter, 209 U.S. 349, 356, 28 Sup. Ct. 529, 52 L. Ed. 828, wherein the Supreme Court held that a state might lawfully prohibit the transportation of the waters of its rivers, lakes, and ponds out of the state by means of canals or conduits because the interest of a state to maintain the rivers within it undiminished by diversions of their waters from their natural channels to other jurisdictions is fundamental, omnipresent, more pressing as population increases and superior to the right of the riparian proprietors which is subject 'to the initial limitation that it may not substantially diminish one of the great founda-

> tions of public welfare and health.' But the right of the owner of grain, iron, coal, oil, and natural gas in a state is subject to no such initial limitation. The reason for the rule which dominates this decision does not exist in the case of the prohibition of the transportation out of a state of such articles owned by private parties and cessante ratione, cessat et ipsa lex." 187 F. 411.

If there remained any lingering doubt but that the dictum in *McCarter*, relied upon here by Appellant, is inapplicable to a commodity which "belongs to the owner of the land, and, when reduced to possession, is his individual property subject to sale by him," *West v. Kansas Natural Gas Co.*, 221 U.S. 229, 255 (1911), it was dispelled by this Court in *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923). In that case, with Mr. Justice Holmes dissenting and urging the *McCarter* opinion, this Court followed *West v. Kansas Natural Gas Co.* and held unconstitutional a West Virginia statute that interfered with interstate commerce in natural gas.

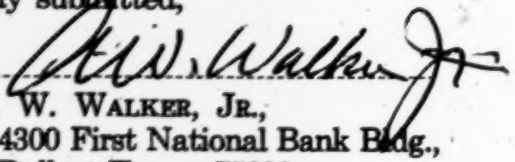
For the foregoing reasons, it is clear that the court below was correct when it described Appellant's police power argument as "not a novel one" (Opinion 18) and rejected it upon the basis of the law as set out in *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), and *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911). Such argument was expressly rejected by those cases, more than forty years ago, and has not since been successfully urged. "[I]n the matter of interstate commerce, we are a single nation—one and the same people." *Pennsylvania v. West Virginia*, 262 U.S. 553, 596 (1923). See also *Hood & Sons v. Du Mond*, 336 U.S. 525, 538-539 (1949).

Three Texas judges have carefully examined *Article 7477b, Texas Revised Civil Statutes*, and, after considering every contention which Appellant now makes in this Court, have determined that the statute cannot be upheld. Their decision and opinion are so clearly correct that there is no necessity or justification for further review by this Court.

CONCLUSION

The Jurisdictional Statement does not and cannot show any error on the part of the court below. It is clear that the judgment of that court was right, for each and all of the reasons assigned in its opinion. There is nothing that could even begin to justify plenary consideration of this case by the Supreme Court of the United States. Accordingly, Appellees pray that this Motion to Affirm be granted.

Respectfully submitted,



A. W. WALKER, JR.,
4300 First National Bank Bldg.,
Dallas, Texas, 75202,
Attorney for Appellees.

Of Counsel:

BEN B. WEST,
4300 First National Bank Bldg.,
Dallas, Texas.

JACK PEW, JR.,
4300 First National Bank Bldg.,
Dallas, Texas.

JACKSON, WALKER, WINSTEAD,
CANTWELL & MILLER,
4300 First National Bank Bldg.,
Dallas, Texas.

PROOF OF SERVICE

I, A. W. Walker, Jr., Attorney for Appellees, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 22nd day of September, 1966, I served copies of the foregoing Appellees' Motion to Affirm on the Appellant, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to each of the following Attorneys of Record in this cause:

WAGGONER CARR
Attorney General of Texas

HAWTHORNE PHILLIPS
First Assistant Attorney General
of Texas

T. B. WRIGHT
Executive Assistant Attorney
General

J. ARTHUR SANDLIN
Assistant Attorney General

GEORGE C. BLACK, JR.
Assistant Attorney General

ROGER TYLER
Assistant Attorney General

Post Office Drawer R
Capitol Station
Austin, Texas, 78711.

A. W. Walker, Jr.
A. W. Walker, Jr.

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NO. 481

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

WAGGONER CARR,
Defendant-Appellant,

vs.

CITY OF ALTUS, OKLAHOMA, ET AL.,
Plaintiffs-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

APPELLANT'S BRIEF OPPOSING MOTION TO AFFIRM

WAGGONER CARR
Attorney General of Texas

HAWTHORNE PHILLIPS
First Assistant Attorney General of Texas

T. B. WRIGHT
Executive Assistant Attorney General

J. ARTHUR SANDLIN
Assistant Attorney General

GEORGE C. BLACK, JR.
Assistant Attorney General

ROGER TYLER
Assistant Attorney General

Post Office Drawer R
Capitol Station
Austin, Texas 78711

Attorneys for Waggoner Carr and the State of Texas